IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: DA6/2015

In the Matter between:

SASOL NITRO **Appellant**

and

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY **First Respondent**

and

MOKGERE MASIPA N.O. **Second Respondent**

CLEMENT REDDY **Third Respondent**

Heard: 23 February 2016

Delivered: 03 May 2017

Summary: Review of arbitration award- appropriateness of sanction – commissioner reinstating employee without back pay – such finding consonant with the *Sidumo* test –

Held: the determination of fairness, including the fairness of a sanction is always fact-specific, and because generalities do not dominate the task at hand, the

sanction must be individualised - commissioner taking into account the employee's seniority and unblemished record in assessing the fairness of the sanction – no case advanced why continued employment intolerable, reinstatement the primary remedy – Labour Court's judgment upheld and appeal dismissed with costs.

Coram: Ndlovu, Musi and Sutherland JJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appeal is against the dismissal of a review of an arbitrator's award. The arbitrator found that the decision by applicant employer (Nitro) to dismiss its employee, the third respondent (Reddy), was unfair and that the misconduct of which he was guilty did not warrant dismissal. The award reinstated Reddy without back-pay. The effect of that meant that Reddy was without pay between the date of his dismissal on 20 December 2010 until the date of his reinstatement on 25 August 2011; ie. for 10 months, a *de facto* fine.

[2] Accordingly, the critical issue on appeal is whether a reasonable arbitrator could not have reached such a conclusion. (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC)).

[3] An internal Appeal Tribunal pared down the extent of the misconduct of which Reddy had been found guilty, and it is the Appeal Tribunal's findings that constitute the employer's decision to dismiss, rather than the decision of the chair of the initial disciplinary enquiry.

[4] A comment on the approach to the presentation of Nitro's case in formulating its complaints on review and in formulating the notice of appeal and heads of

argument is warranted. It is unhelpful to attack a decision by assaulting the reader with a fusillade consisting of every nit-picking point that the drafter's imagination can conjure up and moreover duplicating the points by phrasing the same complaint slightly differently over and over again. A court requires a coherent focused articulation of the real issues; ie matters of substance that can support a plausible argument. Drowning the reader in detail with a multitude of petty points, artificially divided up into numerous separate paragraphs which inevitably overlap achieves two outcomes; to obfuscate the true issues and irritate the Court. If such an approach serves to impress litigants, then litigants must be disabused by legal practitioners of their appetite for rambling, repetitive waffle. The watchwords in formulating all documents to be presented to a court ought to be brevity, lucidity and cogency.

The misconduct of which the appeal tribunal found Reddy guilty

[5] The charges were formulated thus:

> ''1. Dishonest Conduct
>
> 5(e) Incorrect application of company assets or property for reasons of personal gain or any improper purpose, in that you used the store room for storing 'personal staff' viz. shin guards in boxes for sale in the Sasol premises without authorisation.
>
> You also acted outside your responsibility, by appointing a temporary employee (Xavin Dayal) without following an appropriate procedure and securing the employee contract [sic] with WLS without the knowledge of your superiors.
>
> 2. Gross Negligence
>
> You deliberately disregarded the Procurement Supply Management policy (PSM), where you procured services and items outside the system.
>
> Allowed contractors to provide services without purchase orders viz. Ponen Construction cc, invoice dated 12 October 2010; Q14 WLS-repairs and install work done on Ranco etc.

3. Disorderly conduct

6.5 (c) Improper / disgraceful conduct which are in conflict with the accepted norms of behaviour vesting in the Sasol Values, the Sasol Code of Ethics and the Guidelines to the Code of Ethics, and/or the commission of criminal offences, either within or external to the work situation, which can blemish the company's image or bring the Company into disrepute, where you used the company laptop for pornographic material.'

[6] Reddy admitted that he stored shin guards on company property, that he had secured the utilisation of a temporary employee, Dayal, and that he had stored, on his company computer, pornographic material. These admissions were offered up by Reddy as pleas of guilty to the charges. I doubt that he appreciated the distinction between an admission and a plea of guilty. What he did not intend to do is concede more than the facts. The unstated implications about the nature of the culpability, which supposedly flowed from the charges could not have been his intention to admit. Reliance on the formality of his pleas of guilt would have been inappropriate. Thus, proof of all the elements save the facts admitted, had to be adduced.

[7] Reddy was convicted of all three charges by the disciplinary enquiry chair. These findings went on appeal and were varied.

[8] The appeal findings were sloppily formulated. The text of the letter declaring the outcome does not trouble to set out the charges and the critical findings of fact. Instead, it states this:

'…. I have arrived at a decision to uphold the sanction of a dismissal. Please note that two of the three charges addressed in the initial disciplinary hearing were not in dispute at the appeal hearing.

As far as the third charge is concerned, Mr Reddy was found guilty on some of the allegations pertaining to the charge but also cleared on others.

> The nature of his transgressions, particularly when considered as a collective, has informed my decision to uphold the sanction of a dismissal. This decision was further informed by Mr. Reddy's level of responsibility in the organisation when the transgressions took place.'

[9] The two charges supposedly not in dispute were charges 1 and 3 where a plea of guilty had been tendered, a misconception already addressed. The "third" charge is a reference to charge no 2. The phrase taken "as a collective"; must presumably be understood to mean "taken cumulatively" to determine an appropriate sanction. As a result of the vagueness and ambiguities in this text, the first exercise is to unravel what *conduct* (regardless of its labels) was relied upon to conclude culpability.

[10] It is convenient to dispose of charge no 2 first. The review court found that the unrebutted evidence of Reddy that the appeal chair had cleared him of culpability in respect of the Ponen and Ranco affairs eliminated those issues. That finding is not challenged. Moreover, the wholly improper "etc" in the charge had been relied on by Nitro in the disciplinary proceedings to introduce evidence of matters not properly identified in the charges, but the evidence of the disciplinary enquiry chair in the arbitration had been that he had ignored the matters covered by "etc". Accordingly, the substance of charge two is stripped out. The introductory sentence plainly cannot stand as a self-standing charge. Thus, charge 2 is to be left out of account in its entirety.

[11] In respect of Charge no 1 part (i), the review court understood that the gravamen of the complaint about the unauthorised storage of shin pads, his personal property, was regarded by Nitro as an example of dishonesty. An attempt to establish that Reddy was offering the shin pads for sale to co-workers failed. The thrust of the conviction was thus the storage *per se* and, by implication, the unauthorised use of a company facility. The question was thus whether this behaviour could, objectively, amount to dishonesty or was merely an abuse of a company asset.

[12] In respect of Charge no 1 part (ii), the charge seems to have four legs.ie, that Reddy exceeded his authority, that he failed to use an “appropriate procedure”, that he acted without senior management being aware he was so acting, and that the temporary employment of Dayal was secured with WLS (a contractor who habitually did business with Nitro by supplying temporary staff). Clarity on the true focus of the complaints revealed that the point to be made was that there was a standard procedure, accessible on Nitro’s intranet system, which Reddy was expected to follow, and he did not do so; wasa common cause fact. Reddy’s defence was that he was ignorant of the procedure, and though conceding it would be accessible on the intranet, claimed that there was so much data on the intranet, it was not easy to find it, and moreover, he was authorised to secure WLS’s services for which precedent existed in this regard. An important contextual factor was that there was a desire from senior management to tighten up on adherence to prescribed procedures shortly prior to the events giving rise to the disciplining of Reddy; ie a tightening up in policy that disturbed hitherto the established relaxed practices in this regard. The review court understood the complaint to be that Reddy’s conduct was somehow dishonest. The question was thus whether the omission to follow the prescribed procedure was an act of dishonesty or merely a failure to comply with the procedure; ie an example of negligence.

[13] In respect of charge no 3, the review court described the complaint about the pornography found stored on the company computer as "disorderly” conduct, the omnibus term used in the disciplinary code to cover several examples of misconduct. The defence of Reddy was that he received lewd e-mails and stored them, did not view them during working hours, and did not forward them to anyone. That version remained unrebutted.

[14] Ultimately, the review court summed up what Reddy was guilty of at [32] - [33] of the judgment:

> '….there is no problem with applying the cumulative effect of a number of disciplinary charges to increase a recommended sanction, even to the point of dismissal, but one must of necessity, consider what is being accumulated.
>
> In this case, it turns out to have been the unauthorized storage of shin guards, without evidence that they were being sold on the employers property; the possession on his laptop of pornographic material of a nature that would attract a serious warning; and, even if one allowed the applicant [ie Nitro] the benefit of the doubt in this regard, the securing of a temporary employment contract with a temporary employment service in respect of services that the company required, for which there was a clear precedent and which the third respondent[ie Reddy] believed had been authorized by his seniors, albeit that all of this happened without compliance with specific company procedure.'

[15] Why is the award not one to which a reasonable arbitrator could not have come?

[16] In my view, the misconduct described is not even remotely such that, in the context of employment discipline, it can be described as acts of "dishonesty"' and the review court was correct to find that it did not constitute dishonesty. The three examples evidence (1) an abuse of a company storage facility without any costs implications to Nitro, (2) at best, a failure to adhere to a prescribed procedure in obtaining a sub contractor's services, and (3) unauthorised use of the company laptop to store dirty pictures. As to the last-mentioned, in the absence of dissemination, no risks to reputation or threat of corporate embarrassment arose.

[17] Against that misconduct it was necessary to weigh 18 years of unblemished service and the assignment to Reddy of a responsible role as manager of the plant, signifying his abilities and service to Nitro. Why would the heavy financial sanction, imposed by implication, by the arbitrator, not be an appropriate sanction? The question is not that an arbitrator *could* have taken a more serious view of the matter but rather, could a reasonable arbitrator be *incapable* of imposing the lesser sanction. The Review court upheld the arbitrator. In our view that was a correct application of the *Sidumo* test.

[18] The argument of Nitro seeks to lay emphasis on a number of aspects of the relationship between Nitro and Reddy. In the main, the themes are universally pertinent factors. The flaw in the argument is that the factors cannot trump the obligation of an arbitrator to assess in context, *ad hoc,* the circumstances of the parties and fit an appropriate sanction accordingly. What is fair or unfair is always fact-specific, and generalities do not dominate the task at hand to individualise the sanction; that is precisely what an "appropriate sanction" means. I address the main complaints articulated in argument.

[19] First, the seniority of Reddy was emphasised in his managerial role, a generically important factor. It is not correct that this was not appropriately weighed, and is, in my view, the critical justification why no back pay was awarded.

[20] Second, the question of the extent to which Reddy was aware of all procedures and practice and had been trained in them was indeed relevant. However, his culpability in this regard was not, in my view, left out of account in the value judgment made by the arbitrator.

[21] Third, a not unimportant factor was that the misconduct of which Reddy was indeed found guilty did not result in any harm or damage or loss of any kind to Nitro. The several acts were all breaches of governance matters, which are capable of being addressed in a continued employment relationship. The gravamen of the misconduct was not of the kind that makes a resumed relationship intolerable.

[22] Fourth, the argument that Reddy pleaded guilty to charges 1 and 3 is an exaggeration bound to misdirect the assessment of the reach of his admissions. The persistence with submissions relying on aspects of charge no 2 was pointless and inappropriate for the reasons given above.

<u>The complaints about the arbitrator's conduct</u>

[23] The plethora of arguments advanced strove to leech a great deal from very little. Distilled, it seems what is advanced, consists of the following:

[24] The seniority issue and the awareness of the rules have been addressed already. It suffices, in this context, to observe that these issues were not ignored by the arbitrator.

[25] The "pornography" count looms large. Yet the charge, which draws on the text of the disciplinary code paragraph 6.5(c), in my view, despite the way it was relied upon in the proceedings, seems not obviously to be an injunction that covers the keeping of pornography on the laptop. Paragraph 6.5 (l) of the code deals with "indecency" and "accepted community norms" and might have been a closer match, but Reddy was not charged with that. Still less was he charged under paragraph 6.5 (n) of the code, which concerns itself with the reputation of Nitro being tarnished. Viewing pornography *per se* is not a criminal act, unless, of course, it is child pornography, an accusation not made in this case. deplorable as it may be, and moreover, no evidence exists to prove he viewed it instead of doing his job. What was left of the charge, was in, truth, as alluded to above, no more than abusing the laptop for private purposes.

[26] Some contradictions and apparent contradictions in the factual findings of the arbitrator are highlighted. Taking that criticism as read for present purposes, it needs to be appreciated that getting the facts wrong is not a procedural "irregularity". It is one of several factors that justify setting a result aside if, and when, the errors make a difference. In this case, the alleged confusions and errors do not have an effect on the outcome. A similar assessment applies to the absence of a justification for the findings a procedural mishap in the internal enquiry; ie, it does not affect the outcome. *(See: Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC) at [15]).

The Review Court's Judgment

[27] The plethora of complaints in respect of the review court's judgment is a regurgitation of the complaints about the arbitrator's decision and takes the controversy no further.

Conclusions

[28] The true heart of the controversy is the dissatisfaction of Nitro that Reddy should be reinstated. However, that is the primary remedy.[1] No argument is advanced by Nitro why that would not be feasible.[2] Once the sanction of dismissal was held to be inappropriate, that consequence had to follow in the absence of a case to show an intolerability.

[29] In summary, Reddy, the plant manager, misbehaved by using a spare storage room to hoard his own stuff, he neglected to inform himself of standard procedures regarding hiring temporary staff, and he kept pornographic material on the company laptop for his personal gratification. The arbitrator thought he had done wrong, but that having regard to his personal circumstances, of which the most signal factor was 18 years of service, held that he should keep his job and be fined 10 months' pay. It was not a light sanction and is not unreasonable.

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[1] Section193 (1) and (2) of the Labour Relations Act 66 of 1995 provides:
Remedies for unfair dismissal and unfair labour practice
(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-
(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
(c) order the employer to pay compensation to the employee.
(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-
(a) the employee does not wish to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure.

[2] See: *Edcon Ltd v Pillemer N.O*. (2009) 30 ILJ 2642 (SCA).

[30] The appeal should be dismissed and the orders confirmed. Back-pay in terms of that order shall have to be calculated from 25 August 2011, the date fixed in the award. As no evidence has been adduced about the employment experience of Reddy over the past six years, if necessary, a computation shall have to be made of any earnings from other employment that may have occurred be made, to set off such income from the back pay that has become due and payable.

[31] The review court granted costs, and the costs of appeal should also be borne by Nitro, given that an individual has had to finance his own litigation.

The Delay in delivering this judgment

[32] This case was heard on 23 February 2016 and judgment has been delayed for over a year. This delay is regretted and has been occasioned by the ill-health of Ndlovu JA who regrettably passed away on 18 April 2017. We offer our apologies to the litigants for the delay.

The Order

(1) The appeal is dismissed with costs.

(2) The order of the Review Court is confirmed.

(3) The Third respondent shall tender his services within thirty days of the date of this judgment.

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Sutherland JA

Musi JA concur in the judgment of Sutherland JA

APPEARANCES:

FOR THE APPELLANT: Attorney D O Pretorius of Fluxmans Attorneys.

FOR THE THIRD RESPONDENT: Adv D Sridutt,

Instructed by T Giyapersad Inc.